IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

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NO. 80-5602

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SUPREME COURT, U.S.

CURFEW DAVIS,

Petitioner,

v.

STATE OF GEORGIA, ET AL.,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF GEORGIA

BRIEF FOR THE RESPONDENT STATE OF GEORGIA IN OPPOSITION

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QUESTION PRESENTED

Where a State habeas Petitioner was represented by counsel and sought appointment of counsel to litigate issues not cognizable in the State habeas proceeding, did Petitioner have the constitutional right to appointment of counsel?

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STATEMENT OF THE CASE

Petitioner was convicted of murder and sentenced to death in Troup County, Georgia, Davis v. State, 236 Ga. 804, 225 S.E.2d 241 (1976); but his death sentence was vacated by this Court. Davis v. Georgia, 439 U.S. 122 (1976). The Georgia Supreme Court ordered a new trial on sentencing, Davis v. State, 238 Ga. 295, 232 S.E.2d 565 (1977); and Attorney Millard Farmer represented Petitioner at the second re-sentencing trial. Petitioner again received the death penalty. Davis v. State, 241 Ga. 376, 247 S.E.2d 45 (1978), cert. denied, 439 U.S. 947 (1978).

Still represented by Attorney Farmer, Petitioner filed a motion for declaratory and injunctive relief in the Superior Court of Tattnall County, Georgia. Petitioner, by counsel, alleged he needed appointed counsel, funds, investigators, and expert witnesses to develop four alleged constitutional errors:

(1) The composition of his traverse jury was unconstitutional;

(2) His prior convictions were inadmissible;

(3) A change in venue should have been granted;

(4) The Georgia Supreme Court did not properly review the imposition of the death penalty.

However, all four issues had been ruled on by the Georgia Supreme Court on direct appeal. The Georgia Supreme Court had already held that the trial court did not err in overruling the challenge to the traverse jury array, denying the motion for a change of venue, and admitting Petitioner's prior convictions into evidence. Davis v. State, 241 Ga. 376(1)(5)(6), 247 S.E.2d 45 (1978), cert. denied, 439 U.S. 947 (1978). Ga. Code Ann. § 27-2537 requires the Georgia Supreme Court to determine if a death sentence was imposed under the influence of passion, prejudice, or any other arbitrary factor and whether the death penalty is excessive or disproportionate to the penalty imposed in similar cases. The

Georgia Supreme Court did a sentence review on Petitioner's direct appeal and affirmed imposition of the death penalty. Id. at 386-87.

The law in Georgia is that once an accused has been given appellate review on an issue, he cannot raise the issue by habeas corpus. Elrod v. Ault, 231 Ga. 750, 204 S.E.2d 176 (1974). Therefore, Petitioner, by counsel, was seeking appointment of counsel, funds, expert witnesses, and investigators to litigate issues in State habeas proceedings that could not be litigated in State habeas proceedings.

In the Tattnall County proceeding Petitioner was also represented by Attorney Joe Nursey. Attorney Jack Boger of the NAACP Legal Defense Fund and Patsy Morris of the ACLU appeared to testify on Petitioner's behalf.

The Prisoner Legal Counseling Project (PLCP) is funded by the State of Georgia through the Department of Offender Rehabilitation. The PLCP is obligated to send an attorney at least one time per month to every institution in the State where State inmates are confined. Each week two attorneys go to Georgia State Prison in Tattnall County, where Petitioner was confined, and spend a minimum of one day there.

The Superior Court of Tattnall County appointed the PLCP to represent Petitioner, and the State appealed. On appeal to the Georgia Supreme Court, Petitioner was represented by Attorneys Farmer, Nursey, and Andrea I. Young. The Georgia Supreme Court reversed and held that Georgia habeas petitioners are not entitled to appointed counsel. State v. Davis, 246 Ga. 200, ___ S.E.2d ___ (1980).

REASON FOR NOT GRANTING THE WRIT

WHERE A STATE HABEAS PETITIONER WAS REPRESENTED BY COUNSEL AND SOUGHT APPOINTMENT OF COUNSEL TO LITIGATE ISSUES NOT COGNIZABLE IN THE STATE HABEAS PROCEEDING, PETITIONER DID NOT HAVE THE CONSTITUTIONAL RIGHT TO APPOINTMENT OF COUNSEL.

In Ross v. Moffitt, 417 U.S. 600 (1974), this Court held that neither the due process clause or the equal protection clause of the Fourteenth Amendment required the State to appoint counsel on an indigent criminal defendant's discretionary appeal to the State Supreme Court or petition for writ of certiorari to this Court.

Bounds v. Smith, 430 U.S. 817 (1977) does not mandate the appointment of counsel for indigent petitioners in State habeas proceedings. Bounds v. Smith involved three separate actions under the Civil Rights Statute, 42 U.S.C. § 1983. Id. at 818. This Court held "that the fundamental constitutional right of access to the courts requires prison authorities to assist inmates in the preparation and filing [Emphasis added] of meaningful legal papers by providing prisoners with adequate law libraries or assistance from persons trained in the law." Id. at 828. Among the various alternatives were inmate assistants, para-professionals, and law students. Id. at 831.

The issue in Bounds was protecting the ability of the inmate to prepare a petition or complaint. Id. at 828, n. 17. This Court did not hold that indigent State habeas petitioners are entitled to appointment of counsel. Moreover, Petitioner has been represented by four different attorneys in his post-conviction litigation.

Rule 8(c) of 28 U.S.C. § 2254 and 18 U.S.C. § 3006A(g) provide that if an evidentiary hearing is required for an indigent

habeas corpus petitioner, the District Court shall appoint counsel if the interests of justice require appointment. United States Courts are authorized to be appropriated money necessary to carry out the above provisions. See 18 U.S.C. § 3006A(j). The payment of these services is to be made under the supervision of the Director of the Administrative Office of the United States Courts. Id.

There is no statutory authority in Georgia for the appointment or payment of lawyers to represent indigent State habeas procedures. The Constitution does not require appointment. Cf. Ross v. Moffitt, 417 U.S. 600 (1974).

Moreover, nothing would prevent the appropriate District Court, if Petitioner applied for federal habeas relief, from appointing counsel and holding an evidentiary hearing if the District Court believed Petitioner need an attorney to develop adequately his habeas allegations. See 28 U.S.C. § 2254.

CONCLUSION

This Court should refuse to grant a writ of certiorari because no sufficient reasons for review have been set forth by the Petitioner.

Respectfully submitted,

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